

## ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "Agreement") is dated as of \_\_\_\_\_, 2016, and is made and entered into among The Bank of New York Mellon Trust Company, N.A. (the "Escrow Agent"), City of West Lafayette, Indiana (the "Owner") and Bowen Engineering Corporation (the "Contractor").

**WHEREAS**, the Owner and the Contractor have entered into a Contract dated, December 15, 2015, (the "Contract"), providing for the construction by the Contractor of a public work subject to the provisions of Indiana Code 36-1-12-14; and

**WHEREAS**, said Construction Contract provides that portions of payments by Owner to Contractor shall be retained by owner (said payments herein referred to as "Retainage") and;

**NOW THEREFORE**, in consideration of the covenants and agreements herein contained, and for other good, fair and valuable consideration and reasonably equivalent value, the receipt and sufficiency of which are hereby acknowledged by the parties hereto, the parties do agree as follows:

### **Section 1. Establishment of Escrow Account**

(a) Owner shall deposit or cause to be deposited with Escrow Agent all Retainage due under the Contract to be held, invested, reinvested and disbursed by the Escrow Agent in accordance with the terms of this Agreement. The Escrow Agent agrees to accept said deposit and establish and maintain a separate account (the "Escrow Account") therefore in its capacity as Escrow Agent pursuant to the terms of this Agreement.

### **IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT:**

(b) By executing this Agreement, the Owner and the Contractor hereby acknowledge that the Escrow Agent is subject to federal laws, including the Customer Identification Program (CIP) requirements under the USA PATRIOT Act and its implementing regulations, pursuant to which the Escrow Agent is required to obtain, verify and record information that allows the Escrow Agent to identify the Owner and the Contractor. The Owner and Contractor each agree and acknowledge, as a condition precedent to opening the Escrow Account and performing its obligations under this Agreement, the Escrow Agent will ask the Owner and the Contractor to provide certain information including, but not limited to, their names, physical addresses, tax identification numbers and other information that will reasonably assist the Escrow Agent in identifying and verifying their identity, such as organizational documents, certificate of good standing, license to do business, or other pertinent identifying information

### **Section 2. Investment.**

(a) The Escrow Agent shall invest and reinvest all escrowed principal and income therefrom pursuant to the written direction of the Contractor in the Dreyfus Cash Management Fund - Participant Share Class. Any loss or expense incurred as a result of an investment will be borne by the Escrow Account.

(b) The Escrow Agent is hereby authorized to execute purchases and sales of investments through the facilities of its own trading or capital markets operations or those of any affiliated entity. The Escrow Agent shall send statements to each of the parties hereto on a monthly basis reflecting activity in the Escrow Account for the preceding month.

(c) The Owner and the Contractor acknowledge and agree that the delivery of the escrowed property is subject to the sale and final settlement of investments described herein. The Escrow Agent is hereby authorized to sell any investment immediately prior to the release of all or any portion of the Escrow Account occurring pursuant to the terms of this Agreement. Escrow Agent, or any of its representatives, shall not be held liable for any investment loss resulting from any investment made, sold or otherwise liquidated in accordance with this Agreement. -

### **Section 3. Disbursement of Escrow Account**

(a) The Escrow Agent shall hold all principal and income of the Escrow Account until receipt of written notice from the *Owner*, specifying the part of the Escrow Account to be released and the person to whom that portion is to be released. After receipt of notice, the Escrow Agent shall promptly sell or liquidate an amount necessary to effect such disbursement and shall remit the designated amount from the principal balance of the Escrow Account as instructed by such notice.

(b) Each funds transfer instruction shall be executed by an authorized signatory, a list of such authorized signatories is set forth on Exhibit A. The undersigned is authorized to certify that the signatories on Exhibit A are authorized signatories. The persons and telephone numbers for call-backs may be changed only in a writing actually received and acknowledged by the Escrow Agent. The Escrow Agent and the beneficiary's bank in any funds transfer may rely solely upon any account numbers or similar identifying numbers provided by the Owner or the Contractor to identify (i) the beneficiary, (ii) the beneficiary's bank, or (iii) an intermediary bank. The Escrow Agent may apply any of the escrowed funds for any payment order it executes using any such identifying number, even when its use may result in a person other than the beneficiary being paid, or the transfer of funds to a bank other than the beneficiary's bank or an intermediary bank designated. The parties to this Escrow Agreement acknowledge that these security procedures are commercially reasonable.

(c) In the absence of the above-stated written authorization for release of escrowed funds, the Escrow Agent shall pay over to the Owner the net sum held by it pursuant to this Agreement upon receiving from the Owner a copy of a written notice of termination showing that the Owner has terminated the employment of the Contractor.

### **Section 4 Concerning the Escrow Agent**

Notwithstanding any provision contained herein to the contrary, the Escrow Agent, including its officers, directors, employees and agents, shall:

(a) not be liable for any action taken or omitted under this Agreement so long as it shall have acted in good faith and without gross negligence;

(b) have no responsibility to inquire into or determine the genuineness, authenticity, or sufficiency of any securities, checks, or other documents or instruments submitted to it in connection with its duties hereunder;

(c) be entitled to deem the signatories of any documents or instruments submitted to it hereunder as being those purported to be authorized to sign such documents or instruments on behalf of the parties hereto, and shall be entitled to rely upon the genuineness of the signatures of such signatories without inquiry and without requiring substantiating evidence of any kind;

(d) be entitled to refrain from taking any action contemplated by this Agreement in the event that it becomes aware of any disagreement between the parties hereto as to any facts or as to the happening of any contemplated event precedent to such action;

(e) be compensated for its services. Said compensation shall be computed per the fee schedule attached hereto as Exhibit B. The Escrow Agent shall be paid from the income on amounts held pursuant to this Agreement. In the event the Escrow Agent's fee exceeds the income earned, the Contractor shall remit the balance of the fee due prior to release of the Retainage.

(f) be entitled and is hereby granted the right to set off and deduct any unpaid fees, nonreimbursed expenses or unsatisfied indemnification rights from amounts on deposit in the Escrow Account;

(g) in the event that (i) any dispute shall arise between the parties with respect to the disposition or disbursement of any of the assets held hereunder or (ii) the Escrow Agent shall be uncertain as to how to proceed in a situation not explicitly addressed by the terms of this Agreement whether because of conflicting demands by the other parties hereto or otherwise, the Escrow Agent shall be permitted, at the expense of the Escrow Account, to interplead all of the assets held hereunder into a court of competent jurisdiction, and thereafter be fully relieved from any and all liability or obligation with respect to such interpleaded assets. The parties hereto other than the Escrow Agent further agree to pursue any redress or recourse in connection with such a dispute, without making the Escrow Agent a party to same;

(h) have only those duties as are specifically provided herein, which shall be deemed purely ministerial in nature, and shall under no circumstance be deemed a fiduciary for any of the parties to this Agreement. The Escrow Agent shall neither be responsible for, nor chargeable with, knowledge of the terms and conditions of any other agreement, instrument or document between the other parties hereto, in connection herewith, including without limitation the Contract. This Agreement sets forth all matters pertinent to the escrow contemplated hereunder, and no additional obligations of the Escrow Agent shall be implied from the terms of this Agreement or any other Agreement. IN NO EVENT SHALL THE ESCROW AGENT BE LIABLE, DIRECTLY OR INDIRECTLY, FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY KIND WHATSOEVER (INCLUDING BUT NOT LIMITED TO LOST PROFITS), EVEN IF THE ESCROW AGENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES AND REGARDLESS OF THE FORM OF ACTION;

(i) have the right, but not the obligation, to consult with counsel of choice and shall not be liable for action taken or omitted to be taken by Escrow Agent in good faith in accordance with the advice of such counsel; if the Escrow Agent becomes involved in litigation on account of this Agreement, it shall have the right to retain counsel and shall have a first lien on the property deposited hereunder for any and all costs, attorneys' fees, charges, disbursements, and expenses in connection with such litigation; and shall be entitled to reimburse itself therefor out of the property deposited hereunder, and if it shall be unable to reimburse itself from the property deposited hereunder, the parties hereto jointly and severally agree to pay to the Escrow Agent on demand its reasonable charges, counsel and attorneys' fees, disbursements, and expenses in connection with such litigation; and

(j) have the right to perform any of its duties hereunder through agents, attorneys, custodians or nominees.

(k) be, and hereby is, jointly and severally indemnified and saved harmless by the Owner and the Contractor from all losses, liabilities, costs and expenses, including attorney fees and expenses, which

may be incurred by it as a result of its acceptance of the Escrow Account or arising from the performance of its duties hereunder, unless such losses, liabilities, costs and expenses shall have been finally adjudicated to have resulted from the bad faith or gross negligence of the Escrow Agent, and such indemnification shall survive its resignation or removal of the Escrow Agent, or the termination of this Agreement;

(l) never be required to use or advance its own funds or otherwise incur personal financial liability in the performance of any of its duties or the exercise of any rights and powers hereunder. The Escrow Agent agrees to accept and act upon instructions or directions pursuant to this Agreement sent by unsecured e-mail, facsimile transmission or other similar unsecured electronic methods by persons believed by the Escrow Agent to be authorized to give instructions and direction. The Escrow Agent shall not be liable for any losses, costs or expenses arising directly or indirectly from the Escrow Agent's reliance upon and compliance with such instructions notwithstanding any such instruction that conflicts or are inconsistent with a subsequent written instruction. The Owner and the Contractor agree to assume all risks arising out of the use of such electronic methods to submit instructions and directions to the Escrow Agent, including without limitation the risk of the Escrow Agent's acting on unauthorized instructions and the risk of interception and misuse by third parties.

Notwithstanding any other provision of this Agreement, the Escrow Agent shall not be obligated to perform any obligation hereunder and shall not incur any liability for the nonperformance or breach of any obligation hereunder to the extent that the Escrow Agent is delayed in performing, unable to perform or breaches such obligation because of acts of God, war, terrorism, fire, floods, strikes, electrical outages, equipment or transmission failures, or other causes reasonably beyond its control.

Any banking association or corporation into which the Escrow Agent may be merged, converted or with which the Escrow Agent may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Agent shall be a party, or any banking association or corporation to which all or substantially all of the corporate trust business or escrow business of the Escrow Agent shall be transferred, shall succeed to all the Escrow Agent's rights, obligations and immunities hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.

## **Section 5. Tax Matters**

The Owner and the Contractor hereby confirm and certify to the accuracy of the tax certification provided on the signature page hereof, which shall be deemed a Substitute Form W-9 upon execution, or the Owner and Contractor shall otherwise furnish the Escrow Agent with a completed Form W-8 or Form W-9, as applicable. For tax reporting purposes only, the **Contractor** shall be deemed the recipient of the investment income earned on the Escrow Account, and the Escrow Agent shall report and, as required by any law or regulation in effect at the time of the distribution, withhold any taxes accordingly. The Escrow Agent shall have no responsibility for the preparation and/or filing of any tax return with respect to any income earned by the Escrow Account.

## **Section 6. Resignation or Removal of Escrow Agent**

The Escrow Agent may resign by giving thirty (30) days prior written notice to the other parties hereto. Similarly, the other parties may remove or replace the Escrow Agent by giving thirty (30) days prior written notice to the Escrow Agent. In either event, the duties of the Escrow Agent shall terminate thirty (30) days after receipt of such notice (or as of such earlier date as may be mutually agreeable); and the Escrow Agent shall then deliver the balance of the moneys or assets, less any unreimbursed fees or

expenses, then in its possession to a successor escrow agent as shall be appointed by the other parties hereto as evidenced by a written notice filed with the Escrow Agent.

If the other parties hereto have failed to appoint a successor prior to the expiration of thirty (30) days following receipt of the notice of resignation or removal, the Escrow Agent may appoint a successor or at the expense of the Escrow Account, petition any court of competent jurisdiction for the appointment of a successor escrow agent or for other appropriate relief, and any such resulting appointment shall be binding upon all of the parties hereto.

## **Section 7. Notices**

Any notice, consent or request to be given in connection with any of the terms or provisions of this Agreement shall be in writing and be given in person, by facsimile transmission, courier delivery service or by mail, and shall become effective (a) on delivery if given in person, (b) on the date of delivery if sent by facsimile or by courier delivery service, or (c) four business days after being deposited in the mails, with proper postage for first-class registered or certified mail, prepaid. Notwithstanding the above, in the case of communications delivered to the Escrow Agent whereby the Escrow Agent must act based on a specified number of days upon its receipt of such communication, such communications shall be deemed to have been given on the date received by the Escrow Agent.

Notices shall be addressed as follows:

(i) **if to the Owner:**  
City of West Lafayette, Indiana  
222 N. Chauncey Avenue  
West Lafayette, IN 47906  
Attention: Peter Gray, City Controller  
765-775-5151  
765-775-5149 (fax)  
Email: [pgray@westlafayette.in.gov](mailto:pgray@westlafayette.in.gov)

(ii) **if to the Contractor:**  
Bowen Engineering Corporation  
8802 North Meridian St.  
Indianapolis, IN 46260  
Attention: Paul Batchelder  
317-596-4677  
317-596-4777 (fax)

(iii) **if to the Escrow Agent:**  
The Bank of New York Mellon Trust Company, N.A.  
300 North Meridian Street, Suite 910  
Indianapolis, IN 46204  
Attention: *Tanya Smith*  
317-637-3582  
317-637-9821 (fax)  
Email: [tanya.smith@bnymellon.com](mailto:tanya.smith@bnymellon.com)

**Section 8. Governing Law, Counterparts**

This Agreement shall be construed in accordance with the laws of the State of Indiana. It may be executed in several counterparts, each one of which shall constitute an original and all collectively shall constitute but one instrument.

**Section 9. Amendment, Modification or Waiver**

This Agreement may be amended or modified and any term of this Agreement may be waived if such amendment, modification or waiver is in writing and signed by all parties.

**Section 10. Assignments of Interests**

No assignment of the interest of any of the parties hereto shall be binding upon the Escrow Agent unless and until written notice of such assignment shall be delivered to and acknowledged by the Escrow Agent.

IN WITNESS WHEREOF, the parties have been duly executed this Escrow Agreement as of the date first above written.

**The Bank of New York Mellon  
Trust Company, N.A., as Escrow Agent**

**City of West Lafayette, IN  
as Owner**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Authorized Officer

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**Contractor  
Bowen Engineering Corporation**

By: Scot M. Evans  
Name: Scot M. Evans  
Title: CFO

Project: CSO Relief Interceptor (96<sup>th</sup> Interceptor Option) and Roadway Construction

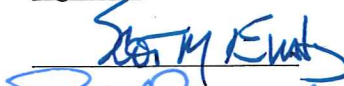

**EXHIBIT A**

**Telephone Number(s) and Signature(s) for  
Person(s) Designated to give Funds Transfer Instructions**

If to Owner:

	<u>Name</u>	<u>Telephone Number</u>	<u>Signature</u>
1.	_____	_____	_____
2.	_____	_____	_____
3.	_____	_____	_____

If to Contractor:

	<u>Name</u>	<u>Telephone Number</u>	<u>Signature</u>
1.	<u>Scot M. Evans</u>	<u>317-842-2616</u>	
2.	<u>Paul Batchelder</u>	<u>317-842-2616</u>	
3.	_____	_____	_____

**Telephone Number(s) for Call-Backs and  
Person(s) Designated to Confirm Funds Transfer Instructions**

If to Owner:

	<u>Name</u>	<u>Telephone Number</u>
1.	_____	_____
2.	_____	_____

If to Contractor:

	<u>Name</u>	<u>Telephone Number</u>
1.	<u>Scot M. Evans</u>	<u>317-842-2616</u>
2.	<u>Paul Batchelder</u>	<u>317-842-2616</u>



# BNY MELLON

## EXHIBIT B

### Schedule of Fees for Retainage Escrow Services

#### THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.

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*Upon Appointment of The Bank of New York Mellon Trust Company, N.A. ("BNYM") as Escrow Agent, the Contractor shall be responsible for the payment of the fee and charges as set forth in this Fee Schedule.*

#### **ANNUAL ADMINISTRATION FEE:**

**\$ 500.00**

Our annual administration fee is a flat fee billed annually in arrears. If the term of the escrow is less than one full year, a minimum fee of \$500.00 will be charged for the first year. If the term is greater than one year, the fee for additional partial years will be prorated based on the number of months open during the year. The Escrow Agent shall deduct the fee from the balance in the Escrow Account.

- The annual administration fee includes the below listed items, as applicable.
  - Initial Account Set-up
  - Routine Escrow Administration
  - Statements of Account to Owner and Contractor
  - Asset Principal & Income Collection
  - Processing of Cash Receipts and Disbursements

#### **INVESTMENT FEES:**

With respect to investments in money market mutual funds, the investment maintenance fee will be calculated at an annual rate of 0 basis points on average total monthly account balances. With respect to investments in money market mutual funds for which BNYM provides shareholder services, BNYM (or its affiliates) may also receive and retain additional fees from the mutual funds (or their affiliates) for shareholder services as set forth in the Authorization and Direction to BNYM to Invest Cash Balances in Money Market Mutual Funds.

#### **SHAREHOLDER SERVICES FEES:**

*Customer acknowledges that the Fund is authorized to make payments from its management fee or any other source available to parties such as banks or broker-dealers ("Service Organizations") that provide shareholder support services to the Fund and that Service Organizations currently are compensated at a rate of up to the Maximum Rate of 0.75% annually of the average net assets of each Fund with respect to which they provide or have provided shareholder support services. Customer further acknowledges that BNYM is a Service Organization and is paid, and hereby consents to such payment, by the Fund up to the Maximum*



*Rate annually of the average daily balance of the Account invested in the Fund for shareholder support services rendered to the Fund by BNYM, which services may include, without limitation, answering client's inquiries regarding the Fund, assistance to clients in changing dividend options, account designations and addresses, processing purchase and redemption transactions, providing periodic statements showing a client's account balance and the integration of such statement with other transactions, arranging for BNYM wires, and providing such other information and services as the Fund's distributor or Customer reasonably may request. Customer further acknowledges that such service may be the same as or similar to services provided by BNY for which a fee may be separately charged under the Agreement. Customer further acknowledges that the Fund may purchase securities from or through BNYM or its affiliates, may engage in repurchase transactions with BNYM or its affiliates, may place funds on deposit in accounts with BNYM or its affiliates and receive interest income thereon and may obtain other services from BNYM for which BNYM is paid a fee.*